

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROBERT MOOS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,757
<b>JERRY'S REPAIR</b>	)	
Respondent	)	
AND	)	
	)	
<b>CIGNA INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent requested review by the Appeals Board of the Award entered by Administrative Law Judge George R. Robertson dated November 1, 1994. The Appeals Board heard oral argument by telephone conference.

**APPEARANCES**

Claimant appeared by and through his attorney, M. John Carpenter of Great Bend, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Mickey W. Mosier of Salina, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Robert A. Anderson of Ellinwood, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopted the stipulations listed in the Award.

### **ISSUES**

Respondent listed the following issues for review by the Appeals Board:

- (1) Nature and extent of claimant's disability.
- (2) Whether the Award should be reduced by the amount of functional impairment determined to be preexisting as required by K.S.A. 44-501(c).
- (3) Payment of unpaid medical bills incurred for the care and treatment of claimant's injury.
- (4) The liability of the Kansas Workers Compensation Fund (Fund).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The Administrative Law Judge awarded claimant an 85 percent permanent partial general body disability based on work disability. The 85 percent work disability was determined according to the "new act" provisions of K.S.A. 44-510e(a) which provides in part as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

On the date of claimant's injury, October 4, 1993, he had been employed by the respondent for ten months as a heavy truck mechanic. Claimant injured his low back when he and his employer, Jerry Soloman, drug a large piece of sheet metal weighing approximately 300 pounds into the repair shop. Claimant, age 50, testified he had experienced previous low back problems off and on since he was 25 years of age.

Claimant first received treatment for his injury from his family physician, Dr. Replogle in Great Bend, Kansas. Dr. Replogle treated claimant conservatively and then referred him to Dr. Paul Stein, an orthopedic surgeon in Wichita, Kansas. Dr. Stein prescribed several weeks of physical therapy followed by a myelography and a CAT scan in February 1994.

Following the accident, claimant remained at work until December 10, 1993, when he was no longer physically able to perform his work duties. Dr. Shivel, a local physician, took over claimant's care and treatment in mid-January 1994. At the time of the regular hearing, July 6, 1994, claimant was seeking employment but had not worked since the last day he worked for respondent on December 10, 1993.

Respondent argued that claimant had failed to sustain his burden of proving the work tasks loss component of the work disability test as required by K.S.A. 44-510e(a). Respondent argued that the only physician who is qualified to testify as to claimant's loss of ability to perform work tasks is the treating physician. Dr. Stein was the treating physician and he refused to express an opinion on claimant's loss of ability to perform work tasks. Respondent concluded that no other physician's opinion on loss of tasks performing ability is admissible.

The Appeals Board disagrees with respondent's contention that the only physician that can testify to claimant's work task-performing ability is the treating physician. The Appeals Board finds that a physician's opinion is required on that issue but it is not limited to the treating physician's opinion. To limit a tasks loss opinion only to the treating physician, would, in some cases, as in this case, make it impossible to obtain evidence on the work tasks component of the work disability test.

Claimant described the work tasks that he had performed over the last 15-year period prior to his accident during his testimony at the regular hearing. Claimant testified he had engaged in the job of truck maintenance for ten years and as a tool salesman for five years. Claimant's attorney requested Philip Roderick Mills, M.D., board-certified physiatrist, of Wichita, Kansas, to examine and evaluate the claimant. Dr. Mills saw claimant once on May 19, 1994. After taking a history from the claimant and reviewing medical records, Dr. Mills opined that claimant aggravated his preexisting low back condition while working for the respondent on October 4, 1993, resulting in a permanent partial impairment of function of 15 percent. Five specific job tasks that claimant testified he had performed in the last 15 years, prior to his work-related injury, were described to Dr. Mills. Dr. Mills opined that claimant definitely could not perform three of the tasks, one task would be difficult for claimant to perform, and the task of driving six to eight hours per day could be performed if claimant changed positions from time to time. No other evidence was presented in the record on claimant's task-performing ability.

The Administrative Law Judge cited the case of Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 rev. denied, 249 Kan. 778 (1991 ), in arriving at claimant's work task loss of 70 percent. The Appeals Board finds that claimant's task loss is required to be determined from the physician's testimony. Dr. Mills was the only physician to testify on that issue. Therefore, the Appeals Board adopts Dr. Mills' opinion that the claimant, post-injury, could not perform three of the five work tasks he performed 15 years preceding the injury. Accordingly, the Appeals Board finds that the claimant, as a result of his work-related injury, has lost 60 percent of his ability to perform work-tasks.

The second component of the "new act" work disability test is the wage loss. The procedure to follow in determining wage loss is specifically set forth as "[the] difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker was earning after the injury." K.S.A. 44-510e(a). The Administrative Law Judge found claimant had a 100 percent wage loss because he had not worked since he had to leave his employment with the respondent as a result of his injury. Respondent did not contest that finding. The Appeals Board, therefore, affirms the Administrative Law Judge's finding that claimant's wage loss component of the work disability test is 100 percent.

The wage loss component is required pursuant to K.S.A. 44-501e(a) to be averaged together with the work task loss component. Averaging the two components, in this case, the Appeals Board finds claimant has an 80 percent work disability.

(2) Respondent argued that the Administrative Law Judge erred when he failed to reduce the work disability award by claimant's preexisting functional impairment as required by K.S.A. 44-501(c). The pertinent part of the statute provides as follows:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

C. Reiff Brown, M.D., an orthopedic surgeon, at the request of the respondent, examined the claimant and opined that claimant had a 15 percent permanent partial functional impairment of the whole body resulting from an aggravation of his preexisting low back condition. Dr. Brown apportioned five percent of the total 15 percent impairment rating to the October 1993 injury. He testified that his opinion was based on the AMA Guides, Third Edition, Revised, and was within a reasonable degree of medical probability. The Appeals Board finds Dr. Brown's opinion credible. Accordingly, the Appeals Board finds claimant's preexisting functional impairment was 10 percent which is required by K.S.A. 44-501(c) to be reduced from the claimant's 80 percent permanent partial general disability award. Therefore, the Appeals Board finds that the appropriate permanent partial general disability award in this case is 70 percent.

(3) Claimant introduced, at the regular hearing, unpaid medical bills from Central Kansas Medical Center and from Kansas Spine Center. The respondent did not argue or present evidence that these medical bills were not authorized medical treatment for claimant's injury. The Administrative Law Judge's Award did not order payment of these medical bills. The Appeals Board finds the medical bills represent authorized medical treatment and orders the respondent to pay the medical bills.

(4) In order to shift liability for an award of compensation to the Fund, respondent must prove: (1) the employer employed or retained the employee with knowledge of preexisting impairment which would constitute a handicap in obtaining or retaining employment; and (2)

the injury at issue in the claim would not have occurred but for or was contributed to by the preexisting impairment. See K.S.A. 44-566 and K.S.A. 44-567.

Respondent argued that the record established that claimant's employer, Jerry Soloman, had known claimant for over 15 years and had previously worked with claimant prior to employing the claimant. Jerry Soloman testified that when he hired claimant he knew that claimant had previous back problems. Claimant testified that although his back, prior to the injury, had not been symptomatic since 1989, he was careful of what he lifted and he got help from his employer when he had to do heavy lifting. Claimant testified that Dr. Replogle had previously advised him that he should not continue to try to perform the heavy truck mechanic work because of his bad back. Dr. Mills diagnosed claimant with preexisting spinal stenosis and degenerative disc disease. Dr. Mills opined he would have placed permanent work restrictions on claimant prior to his October 1993 injury. The Appeals Board disagrees with the Administrative Law Judge and finds, for the above reasons, that respondent hired claimant knowing that he had a preexisting back impairment of such character that it constituted a handicap.

Furthermore, liability will not be assessed against the Fund unless the respondent presents evidence that the preexisting injury, disability or death would not have occurred but for or was contributed to the preexisting impairment. See K.S.A. 44-567. The Appeals Board finds that Dr. Brown's opinion that 10 percent of claimant's resulting 15 percent impairment of function is the most persuasive evidence in the record on the question of the amount of claimant's preexisting impairment that contributed to claimant's resulting disability. Accordingly, the Appeals Board finds that the claimant's preexisting impairment contributed 66 2/3 percent to claimant's resulting disability. The Appeals Board, therefore, orders the Fund to pay 66 2/3 percent of the award.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated November 1, 1994, should be, and is hereby modified and an award is entered as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Robert Moos, and against the respondent, Jerry's Repair, and its insurance carrier, CIGNA Insurance Company and the Kansas Workers Compensation Fund, for an accidental injury sustained on October 4, 1993, and based upon an average weekly wage of \$419.74.

Claimant is entitled to 13 weeks of temporary total disability compensation at the rate of \$279.84 per week or \$3,637.92, followed by 290.5 weeks of permanent partial compensation in the sum of \$279.84, per week or \$81,293.52, for a 70% permanent partial general disability, making a total award of \$84,931.31.

As of September 25, 1996, there is due and owing claimant 13 weeks of temporary total disability compensation at the rate of \$279.84 per week or \$3,637.92, followed by

142.29 weeks of permanent partial compensation at the rate of \$279.84 per week in the sum of \$39,818.43 for a total due and owing of \$43,456.35, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$41,474.96 is to be paid for 148.21 weeks at the rate of \$279.84 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is ordered to pay 66 2/3% of the Award and costs.

Claimant is entitled to all authorized medical expenses to be paid which should include the medical bills attached to the regular hearing and any unauthorized medical expenses to the statutory limit, if any.

Future medical will be considered upon proper application to and approval by the Director.

All other orders of the Administrative Law Judge are incorporated and adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1996.

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BOARD MEMBER

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BOARD MEMBER

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c: M. John Carpenter, Great Bend, KS  
Mickey W. Mosier, Salina, KS  
David Shriver, McPherson, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director